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No. 06-278

In The
Supreme Court of the United States

DEBORAH MORSE, *et al.*,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE LIBERTY LEGAL INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS* CURIAE[1]

The Liberty Legal Institute is a non-profit law firm dedicated to the preservation of First Amendment rights and religious freedom. In its commitment to the protection of religious liberties of all faiths, the Institute represents religious institutions and individuals across the country. The Institute is gravely concerned that the religious freedom of students in public schools will be damaged if the Court reverses the Court of Appeals decision in the present case. The Institute and its counsel have been involved in significant litigation nationwide in the area of student religious speech.

Amicus believes very strongly that the Court's approach in *Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503 (1969), is the best protection for freedom of religious speech. The Court should be very cautious when granting the government broad powers to ban speech. *Amicus* is unwilling to trade the protections *Tinker* affords religious speech for some marginal "victory" over the ambiguous message at issue in this case.

SUMMARY OF ARGUMENT

The cryptic message at issue in this case is not cause for diminishing *Tinker* and derailing almost forty years of

[1] The parties have consented to the filing of this brief. Their general letters of consent have been filed with the Clerk of this Court. Pursuant to this Court's Rule 37.6, none of the counsel for the parties authored this brief in whole or in part and no one other than *amicus* or their counsel contributed money or services to the preparation and submission of this brief.

jurisprudence protecting the political and religious speech of students. Petitioner and her *amici* propose a dangerous test, seeking to recast *Tinker* as a subjective test satisfied by a school official's pronouncement that the school's "basic educational mission" requires suppression of the student speech at issue. This standardless discretion to censor student speech would destroy the fundamental protections in *Tinker* and sanction political and religious viewpoint discrimination. The Court cannot assume that other existing doctrines would protect student speech if *Tinker* were undermined in this way.

Public schools continue to enact broad, sweeping "neutral" speech policies without any objective evidence to support the necessity of their enactment. Public schools claim *Tinker* has no application to broad "neutral" speech censorship policies. *See, e.g., Chalifoux v. New Caney Ind. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997); *Morgan v. Plano Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 7375 (E.D. Tex., Feb. 1, 2007). If the Court adopts Petitioner's proposed subjective test, religious speech would be censored by public schools seeking to establish "neutrality," especially given religious speech is always contrary to the "basic educational mission" because no school may adopt the advancement of religion as its mission.

If the Court wishes to reverse in this case, it could carve out an explicit exception for advocacy of the use of illegal drugs and add that explicit exception to the sexually explicit speech identified in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). But it must be very clear about the basis for that exception. It is no part of the mission of schools to indoctrinate students on issues that are controversial among American adults. Any power to instill values in students, and any power of censorship derived from such a power to instill

values, must be confined to fundamental values necessary to preservation of a democratic system, or to specific skills and behaviors necessary to success in adult life. If schools are given a blank check to define their own missions, and then power to censor any student speech inconsistent with that mission, there will be nothing left of this Court's cases protecting freedom of speech in the public schools.

ARGUMENT

I. If the Court cannot confidently divine the meaning of the sign at issue, and if it thinks that some possible meanings are not constitutionally protected, the writ should be dismissed.

Under most of the meanings that might plausibly be attributed to it, the cryptic sign at issue in this case is clearly protected by the Constitution, even in a public school.

The sign is most plausibly understood as anti-religious, ridiculing or satirizing the basic Christian message, making fun of such commonly displayed signs as "Jesus Saves," or "John 3:16." If this is the meaning of the sign, it must be protected. Religious speech is at the very core of the First Amendment, clearly protected in public schools so long as it is not school-sponsored. *See Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). If public schools have power to ban anti-religious speech, that same power would extend to bans on positive religious speech.

Alternatively, the sign may have been a nonsense phrase, conveying no intelligible meaning. If the Court understands the sign in this way, it is protected simply

because there is no sufficient reason to prohibit or punish it. A meaningless nonsense sign does not convey one of the few messages a school is entitled to prohibit.

Third, somewhat less plausibly, the sign may be understood as suggesting a position on the existing public debate in Alaska, which has led to repeated referenda and to litigation in the state supreme court, over private use of marijuana. If the Court understands the sign in this way, it is a protected comment on an ongoing political debate.

Finally, the petitioner school principal, and *dubitante*, the Court of Appeals, Pet. App. 3a; J.A. 25, understood the sign as promoting drug use among students in violation of the school's strong policy prohibiting student drug use. If the Court attributes this meaning to the sign, then the argument that the sign is protected in a public school context becomes much closer. Still, it is clear that the school's undoubted power to prohibit drug use does not include power to prohibit all criticism of that policy. A student presentation to the school board, arguing for a change in the school's drug policy, would undoubtedly be protected political speech, even if its very purpose was to undermine what the school defined as part of its basic mission. Even in speech addressed to other students, it is hard to imagine that every student remark, however brief, however humorous, however ambiguous, is subject to punishment if it can in anyway be construed as criticizing the school's drug policy. It is far more likely that the respondent student was punished so severely because his sign was the last straw for a principal already irritated by thrown Cokes and snowball fights, J.A. 24, 29, 36, 38, than because the sign had any real tendency to promote drug use.

If the Court thinks that one of the sign's possible meanings is unprotected, then the broad range of possible meanings suggests that this case turns on a factual issue of no particular importance – the meaning of the sign. That issue plainly does not require resolution in this Court. In the quite likely event that the Court can make no confident judgment about the meaning of the sign, the legal issues are presented only in a hypothetical and alternative way. In that event, the proper course is to dismiss the writ as improvidently granted.

What *amicus* fears most is that a loosely worded opinion, holding that students have no First Amendment right to promote drug use, will fatally undermine protection for core religious and political speech in public schools. The vague and deferential standard proposed by Petitioner and her *amici* invites this consequence. Any holding that Respondent's sign is unprotected must be very carefully stated to avoid sending an unintended signal that would do serious damage to the free speech rights of all students, including religious students.

II. The "basic educational mission" of the school cannot be to instill religious or political conformity or to suppress speech with which it disagrees.

A. Petitioner's proposed standard would confer essentially standardless discretion to define a school's mission and then suppress all speech inconsistent with that mission.

However the Court interprets the particular sign at issue in this case, and however it resolves the dispute over that sign, it is critical that the opinion reaffirm students' fundamental right to free speech on religious and political issues. The Court must clearly state that that right still

has broad reach and effectually protective content as applied to students in public schools. Public school officials plainly doubt the continuing vitality of that protection, and many of them would take a win in this case as a green light to censorship, unless the opinion forcefully reminds them of the yellow and red lights that still control most disputes over school censorship.

Petitioner devotes a paragraph to praising Justice Black's dissent in *Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503 (1969). This paragraph reveals the aspiration to a general power of censorship and the hope that this case may be the decisive step in restoring that power.

To that end, Petitioner and her *amici* propose a dangerous test that goes well beyond what is necessary to decide this case. Their proposed test, unless clarified, threatens to seriously undermine landmark decisions of this Court, including *Tinker* and *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001). It is true, as this Court said in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986), that a public school need not permit student speech that directly subverts the school's "basic educational mission." But it is equally true, as the Court of Appeals said below, that in the administration of this test, the school "is not entitled to suppress speech that undermines whatever missions it defines for itself." Pet. App. 12a. That approach would confer on school officials a standardless discretion to censor student speech. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992).

In *Bethel*, the Court's comment about undermining the "basic educational mission" took meaning from the

gratuitous sexual content of the student's speech and from the school's interest in maintaining civility and protecting younger children from offensive and age-inappropriate content. The student reaction to the speech in *Bethel* demonstrated that the speech had in fact been disruptive. Neither the student reaction nor the school's disciplinary action in *Bethel* was based on viewpoint discrimination; the student was using sexual innuendo to attract attention to his candidacy, not to express views on any issue concerning sex. He could easily have promoted his candidacy and expressed any viewpoint relevant to that candidacy without the sexual innuendo. Nothing in the holding or opinion in *Bethel* suggested any broad power to punish speech simply because the school disagreed with the views expressed.

But here the school expressly claims power to punish speech it disagrees with. Petitioner insists that the reason for censorship is precisely the communicative impact of the message expressed. She interprets Respondent's sign to promote drug use; she interprets the school's "basic educational mission" to include prevention of drug use; and therefore, she says, the student can be severely punished for displaying the sign. This is dangerous doctrine, requiring careful confinement if it is to be accepted at all. Petitioner and her *amici* seek to recast *Tinker* as a subjective test satisfied by a school official's pronouncement that the school's "basic educational mission" requires suppression of the student speech at issue.

Petitioner's proposed subjective standard is consistent with a recent approach by the European Court of Human Rights, but roundly rejected in American jurisprudence. *See Leyla Sahin v. Turkey*, App. No. 44774/98, Eur. Ct.

H.R. 299 paras. 112-21 (29 June 2004), http://www.echr.coe.int/ECHR (search by application number under HUDOC) (requiring no evidence that banning students from wearing the traditional Muslim headscarf at a University is necessary to protect a real government interest independent of Turkey's subjective assertion that banning the scarf was in the best interest of the government). The *Sahin* case is remarkably similar to the legal proposal of Petitioner and her *amici*. The government, or the school, gets to define its mission on terms of its own choosing, and then to prohibit all expression inconsistent with that self-defined mission.

With all due respect to the European Court of Human Rights, *amicus* prefers the American jurisprudence on this issue, which holds government to a heavy burden of justifying suppression of speech. *See Greater New Orleans Broadcasting Assn., Inc. v. United States,* 527 U.S. 173, 183 (1999) ("The Government bears the burden of identifying a substantial interest and justifying the challenged restriction"); *Reno v. ACLU*, 521 U.S. 844, 879 (1997) ("The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective . . . "); *Edenfield v. Fane,* 507 U.S. 761, 770-771 (1993) ("burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"); *Board of Trustees of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989) ("The State bears the burden of justifying its restrictions . . . "); *Tinker v. Des Moines Ind. Community Sch. Dist.,* 393 U.S. 503, 509 (1969) ("In order for the State in the person of

school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint").

B. Suppression of speech inconsistent with a school's mission, if tolerated at all, must be confined to uncontroversial parts of the school's mission.

If the Court is willing to accept some version of Petitioner's proposed doctrine with respect to messages thought to promote drugs, then it must be very careful to state what is special about drugs, and to draw clear boundaries between those few student messages that can be suppressed and the student speech that retains constitutional protection. Any viewpoint standard so vague as undermining "the basic educational mission" requires judicial clarification at the inception.

The school's capacity to adopt a viewpoint as part of its educational mission, and to suppress speech inconsistent with that viewpoint, is necessarily quite narrow. The school cannot suppress a student viewpoint as inconsistent with its educational mission unless the school is free, under our Constitution and under the political norms of a free society, to attempt to indoctrinate students into a viewpoint contrary to the student speech that is suppressed. Parents entrust the public schools with their children for important but particular purposes. Parents may expect the school to teach skills and values conducive to success in later life, and they may expect the schools to teach fundamental democratic values. But they do not expect the schools to indoctrinate their children on current

political or religious questions that may be the subject of substantial disagreement among the parents themselves, either locally or nationally. Indoctrination on that sort of question is no part of the school's "basic educational mission," and the schools have no power to censor nondisruptive student speech on such questions.

American political norms certainly, and the Constitution at least with respect to means, prevent the public schools from propagandizing students on controversial political or religious issues. The school cannot prohibit Republican speech, or Democratic speech, or anti-war speech, or pro-war speech, or define such speech as inconsistent with the school's mission. No set of American parents accepts it as part of the public school's role to indoctrinate their children on controversial political issues, and no set of American taxpayers accepts such partisan indoctrination as a legitimate expenditure of education funds. As this Court has long recognized, neither political nor religious indoctrination is part of any school's basic educational mission:

> Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 641 (1943). If the Court is to permit viewpoint-based censorship on the basis of any such amorphous test as inconsistency with the school's "basic educational mission," it must emphatically reaffirm *Barnette*'s insight that inducing political conformity cannot be any part of the school's mission.

The point is more frequently litigated with respect to religion than with respect to politics. This Court has repeatedly held for nearly half a century that it is no part of the mission of public schools to inculcate religion among students. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *School Dist. v. Schempp*, 374 U.S. 203 (1963). Because religious instruction is not part of a school's basic educational mission, speech on religious questions does nothing to undermine a school's educational mission. Therefore, voluntary religious speech and voluntary anti-religious speech is fully protected in public schools.

Nor can the school prohibit all political speech, or all pro-religious and all anti-religious speech, and claim that even-handed suppression is part of its basic educational mission. It is no part of the school's basic mission to stamp out student interest in political or religious controversies or to suppress student participation in such controversies. *Tinker* flatly prohibits such a "neutral" ban. *Tinker* is expressly not limited to viewpoint discrimination. "If a regulation were adopted by school officials *forbidding discussion of the Vietnam conflict*, **OR** the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Tinker*, 393 U.S. at 513 (emphasis added).

Petitioner and her *amici* place much reliance on *Ambach v. Norwich* and its paean to "the importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on

which our society rests." 441 U.S. 68, 76 (1979). But of course one of the central roles of citizens in our system is to participate actively and intelligently in political debates. The people are sovereign in our system, and the people are ultimately responsible for the choice of their political leaders and for the policy choices made by those leaders. It is an essential part of a public school's mission to prepare students for this responsibility. It can never be part of a school's "basic educational mission" to suppress student interest or participation in political or religious discussion.

Ambach also describes public schools "as an 'assimilative force' by which diverse and conflicting elements in our society are brought together on a broad but common ground," and "as inculcating fundamental values necessary to the maintenance of a democratic political system." *Id.* at 77. Of course, freedom of speech is precisely one of these fundamental values "necessary to the maintenance of a democratic political system."

More generally, this "assimilative" function of public schools is necessarily confined, as the Court said in *Ambach*, to values that are "fundamental" and "necessary" to a democratic system, and to a "broad . . . common ground." Let this "assimilative" function expand to values that are less fundamental, less essential to a democratic system, narrow rather than broad, and the public schools would become an engine for instilling conformity and for suppressing discussion of public issues. Representative government, majority rule (subject to protection for individual and minority rights), nondiscrimination and equal protection of the laws, freedom of speech, religion, and assembly, tolerance of dissenting views and of personal and group differences, due process of law, innocent until

proven guilty – these are the kinds of values that may be fairly described as "fundamental" and (the most important of the *Ambach* criteria, because it provides the most real guidance) as "necessary to the maintenance of a democratic political system." And these are not values that provoke much disagreement in principle among American adults, however great the disagreements over particular applications. It is indeed part of the "basic educational mission" of public schools to instill these broad values in each succeeding generation. How far a school may go in suppressing student dissent from one or more of these values is a much closer question, but that question is not presented in this case.

It cannot be part of the school's mission to go beyond such broad and fundamental principles to instill agreement on, or suppress dissent on, more particular social, political, or religious issues. The school cannot define suppression of dissent as part of its educational mission. It cannot justify suppression of dissent by defining its basic educational mission to include instilling support of particular or current government policies or administrations. Nor can it justify suppression of all religious speech, pro and con, because the school's mission does not involve religious speech of its own. And this Court should say so.

A school may also seek to instill uncontroversial personal virtues that have the overwhelming support of the American people and that are often as important as academic skills to success in adult life: honesty, diligence, personal responsibility, obedience to law, tolerance for dissenting views. The Court may conclude that avoidance of drugs is such a virtue. That sort of socialization into responsible adulthood is consistent with American political

norms. But again, this sort of socialization is no justification for suppressing controversial religious or political speech on contemporary issues, even if both sides are equally suppressed.

III. The reasons why the Court might permit suppression of speech promoting drugs have nothing to do with suppression of religious or political speech.

If the Court wishes to reverse in this case, it could carve out an explicit exception for advocacy of the use of illegal drugs and add that explicit exception to the sexually explicit speech identified in *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). But it must be very clear about the basis for that exception.

If a school can prohibit the speech at issue in this case, it is because the school has a valid rule prohibiting students from using drugs, and because Respondent's sign might be interpreted as encouraging student violations of the valid rule of conduct. The use of drugs is a criminal offense, and whatever disagreement there may be about the efficacy of the drug laws, or about the need for laws against adult use of the less dangerous illegal drugs, there is overwhelming consensus in the polity that adults should discourage children from using drugs. As a corollary of its power to regulate serious misconduct, the schools may plausibly have power to prohibit student speech urging serious misconduct.

Of course this corollary does not follow in the adult world. But if the Court thinks the corollary does follow in public schools, it must state clear and objective reasons that confine the decision. The school is engaged in educating

children, and it may seek to educate them about the reasons for its conduct rules. Assuming the conduct rules themselves are not politically or religiously controversial, the Court may conclude that the school may seek to persuade students to believe in these rules and to accept them as norms of behavior. And because children are younger and on average have less impulse control than adults, the school may believe that urging violations is more likely to lead to violations, and that the speaker who persuades a child to violate a rule bears more responsibility for the resulting violation than a speaker who persuades an adult to violate a rule.

These are reasons why the Court might conclude that the age of the students and the educational context may justify restrictions on *advocacy of prohibited conduct* in public schools. But if the Court so rules, it must clearly distinguish this case from *Tinker* and *Good News* and from political and religious speech. Nothing in these reasons for restricting advocacy of student misconduct justifies restrictions on advocacy of controversial political or religious views.

The Court of Appeals said that no government mission is more important than war, so if anti-war speech is protected, pro-drug speech must also be protected. Pet. App. 8a. But that is not the right basis for comparison. If there is a difference between drugs and war, it is that war is not part of the *school*'s mission. The decision to go to war, like most other disputed political decisions, is entrusted to government institutions other than schools. Education of children, and protecting children from self-destructive behavior, is at the core of the mission entrusted to schools. A decision permitting the schools to censor student speech promoting the use of drugs implies

nothing about the schools' power to censor student speech on political issues entrusted to other organs of government, or on religious issues entrusted to churches and synagogues, families, and individual conscience.

IV. *Tinker* is an essential and independent protection for student speech; no other doctrine can safely substitute.

Within the confines of *Tinker*, school officials bear the burden of demonstrating that suppression of student speech is necessary to prevent a material and substantial disruption. *See Tinker v. Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503, 509 (1969). This is a wise balance, protecting student exchange of ideas as part of their education in a democratic society, but permitting government intervention for conduct and that occasional speech that actually disrupts the school. Petitioner seeks to overturn this burden and eviscerate decades of First Amendment jurisprudence following *Tinker* by asking this Court to grant unfettered discretion to school officials to ban speech that the school subjectively determines is inconsistent with its educational mission.

At its heart, Petitioner's proposal is to substitute her basic-educational-mission standard for the substantial-disruption standard of *Tinker*. For the reasons already stated, the basic-educational-mission standard would, unless carefully confined by this Court, give school officials broad discretion to censor student speech. The Court cannot assume that other existing doctrines would protect student speech if *Tinker* were undermined in this way.

The rules against viewpoint discrimination are no protection against rules that simply seek to eliminate

controversy by suppressing all speech on any side of an issue. The infamous resolution banning all "First Amendment activities" in the airport was adopted precisely because of its viewpoint neutrality. *See Board of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569 (1987) (striking down the resolution as overbroad). A rule banning student discussion of politics, or of religion, or of particular political or religious issues, could be viewpoint neutral and not so flagrantly overbroad.

More fundamentally, Petitioner's proposed rule can only be understood as overriding the rule against viewpoint discrimination. A ban on speech promoting drug use is a ban on a particular viewpoint. Petitioner's claim is precisely that she can engage in viewpoint discrimination whenever her school rejects a viewpoint in pursuit of its "basic educational mission."

Nor will public forum doctrine fill the gap. Public forum rules are no help in those parts of the school that are not a part of a public forum, and schools fiercely deny that even their student activity periods are a public forum, let alone the rest of the campus and the rest of the school day. Public forum doctrine is no help when schools close their forum to avoid permitting religious speech, as happened in *Child Evangelism Fellowship, Inc. v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006).[2] One of the reasons *Tinker* is so important is that it is not entangled in public forum doctrine:

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[2] Another example is *Good News/Good Sports Club v. School Dist.*, 28 F.3d 1501 (8th Cir. 1994). Events on remand are not reported, but there the school board succeeded in its strategy of closing the forum.

> *Tinker* did not involve a question of access to public property. When citizens claim a right to enter government property for the particular purpose of speaking, it is relevant to ask whether other speakers have been allowed the same privilege, or whether the property is especially appropriate for speech. The various versions of the public forum doctrine address these questions. But public forum analysis is irrelevant when access is not at issue. When citizens are going about their business in a place they are entitled to be, they are presumptively entitled to speak. Because students were indisputably entitled to be on the school grounds, the only question in *Tinker* was whether the school had a constitutionally sufficient reason to suppress their speech. The Court's requirement that the school show a material and substantial interference with the educational function is addressed to that question.

Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 48 (1987); *see Jews for Jesus*, 482 U.S. at 573 (recognizing that *Tinker* might apply without regard to property's status as a public forum).

Petitioner proposes to eviscerate *Tinker*. If a vague educational-mission test is substituted for the material-disruption test, without firm guidance from this Court about the limited nature of the educational missions intended, student speech will be at the mercy of unrestrained school administrators.

V. Public schools have repeatedly shown that they will use their discretion to censor student speech.

If the Court weakens *Tinker* and gives government school officials the power to censor speech "contrary to the educational mission," schools may define broad missions and enact correspondingly broad prohibitions on speech, inevitably including content-based and viewpoint-based discrimination. This unfettered discretion in the hands of school officials creates two dangers, in addition to controverting any purpose to prepare students to live in a democratic society where the exchange of ideas is the country's lifeblood. First, broad discretion to enact speech regulations "intimidate[s] parties into censoring their own speech, even if the discretion and power are never actually abused." *City of Lakewood v. Plain Dealer Pbl'g Co.*, 486 U.S. 750, 757 (1988). Second, unfettered discretion permits government officials "to roam essentially at will, dispensing or withholding permission to speak . . . according to their own opinions regarding the potential effect of the activity in question on the 'welfare' of the community." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969). A school official accused of viewpoint discrimination will easily avoid judicial scrutiny by claiming that the speech censored was contrary to the educational mission of the school as defined in the context of its local community. Rampant viewpoint discrimination will be the result, and it will occur without any possibility of a remedy.

Religious speech would be among the first banned as out of compliance with the school's mission. Schools continue to claim that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from their own confused definition of their mission.

No school may adopt as part of its mission the advancement of religion. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578 (1987); *Wallace v. Jaffree*, 472 U.S. 38 (1985). That would violate the Establishment Clause. This leads many schools to conclude that any student religious speech is therefore inherently inconsistent with the educational mission of the school and should just be done elsewhere. If this Court accepts an "educational mission" standard, without clearly reaffirming the limits on how schools may define that mission, student religious speech will be an immediate target.

The fears expressed in this brief are not hypothetical. We know from experience that if this Court permits censorship based on a broad discretionary standard like that proposed by Petitioner and her *amici*, public schools will invoke that standard to censor religious and political speech at the core of the First Amendment.

Many schools have persistently sought to suppress student religious speech in violation of this Court's decisions. *See, e.g., Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same problem at university level). There is a litany of cases in every circuit enforcing these decisions against resistance by public schools.

Amicus has handled a legion of cases where schools ban student religious speech under allegedly "neutral" anti-speech policies that can only be stopped by *Tinker*. Currently pending examples include *Morgan v. Plano Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 7375 (E.D. Tex., Feb. 1, 2007), and *Pounds v. Katy Ind. Sch. Dist.*, 4:06-cv-00527

(S.D. Tex.). In *Plano*, students were told they could not share candy canes with their friends, they could not write "Merry Christmas" in "holiday cards" to military troops serving in Iraq, and they could not share pencils with their friends that bore a religious message. In *Katy*, a student was told she could not talk about Jesus during recess. During a class discussion led by the teacher asking students to say what comes to mind when the teacher says the word "Easter," students responded with words such as "bunnies," "eggs" and "jelly beans." One student responded with the word "Jesus." The teacher told her that such an answer was inappropriate at school.

All of these bans were justified under allegedly "neutral" policies banning speech – policies that can best be overcome with *Tinker*, and perhaps only with *Tinker*. These schools plainly think it part of their "basic educational mission" to preserve a religion-free zone. A deferential standard, permitting censorship on the basis of whatever schools declare to be their mission, would go far to validate such policies. If protecting the mission justifies viewpoint discrimination, it would no longer matter whether these schools can plausibly claim that their policies are neutral.

Counsel for *Amicus* also participated extensively in *Chalifoux v. New Caney Ind. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (discussed favorably in *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211-12 (3rd Cir. 2001) (Alito, J.)). In *Chalifoux*, the school district instituted a policy prohibiting rosary beads. The school district believed rosary beads to be a symbol used to identify gang affiliation. The Catholic plaintiffs in *Chalifoux* certainly would find no refuge in either viewpoint or public forum jurisprudence, because the ban on rosaries allegedly had

nothing to do with their religious significance, and because the plaintiffs possessed their rosaries wherever they went, including in the classroom, which courts are reluctant to describe as a public forum.

Without *Tinker*, the students would have been banned from possessing rosaries. If *Tinker* were circumscribed to allow schools to censor any speech inconsistent with its educational mission, the school could ban rosaries or any other religious symbols or expression as inherently inconsistent with the school's secular mission. Only a strong *Tinker* fully protects religious speech in schools.

Tragically, a federal judge, refusing to apply *Tinker*, recently opined that *Tinker* is limited to viewpoint discrimination cases, which he defined narrowly, en route to upholding a broad sweeping ban on student religious speech. *See Morgan v. Plano Ind. Sch. Dist.*, 2007 U.S. Dist. LEXIS 7375 (E.D. Tex., Feb. 1, 2007). Far worse would follow if this Court authorizes school districts to suppress any speech they define as inconsistent with their mission. It is critical that this Court reaffirm that the fundamental right to free speech on religious and political issues still has broad reach and protection.

CONCLUSION

Amicus urges the Court to be very careful and explicit in its decision, which could have enormous implications, intended or not, for religious and political speech. If the Court accepts any form of Petitioner's proposed basic-educational-mission standard, the Court must expressly state the First Amendment limits on a school's capacity to define its own mission for purposes of censoring speech inconsistent with that purpose. The Court should reaffirm *Tinker*, and any exception to *Tinker* should be narrowly confined.

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